

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Complaint of the Greeting Card Association :
: Docket No. C2020-2

GREETING CARD ASSOCIATION ANSWER
TO NATIONAL POSTAL POLICY COUNCIL
MOTION TO DISMISS

In this pleading, the complainant Greeting Card Association (GCA) replies to the motion to dismiss filed on February 19, 2020, by the National Postal Policy Council (NPPC). NPPC's motion should be denied, since the complaint raises material issues of law and fact.

The statute governing complaints. Section 3622(b)(1)(A), the Commission may take one of two courses: (i) if it finds that "such complaint raises material issues of fact or law, [it shall] begin proceedings on such complaint" or (ii) it may dismiss the complaint. In either case, the Commission issues a written statement of "the bases of its determination." The Commission's Rules of Practice track these requirements (see especially 39 CFR sec. 3030.30).

GCA is also responding to two other motions to dismiss, filed by the Postal Service and Pitney Bowes, Inc. There is substantial commonality in the issues raised by the three motions, and GCA respectfully requests that the Commission consider responses in this Answer in relation to the other two motions, and conversely, insofar as that is helpful.

Contrary to the assertions of NPPC's motion, GCA's complaint raises material issues of law and fact.

I. SIMILARITY OF SITUATION

NPPC argues that GCA has not shown business and households to be similarly situated. We agree that similarity of situation is an element of an undue discrimination claim. Our disagreement is over whether we have demonstrated it. For reasons explained next, we have. Since similarity of situation is an element of a sec. 403(c) claim, and it is disputed by movants, it presents a material issue of both fact and law.

NPPC's argument rests principally on the difference in originating volume, as between households and businesses. This is said to show that the two groups are not similarly situated. GCA's complaint shows that the relatively smaller volume generated by households is a reason that they cannot use meters, which in turn helps establish that households and businesses are the distinct groups required for a discrimination claim.

Response to NPPC's volume-based argument. It is generally recognized, and Commission Order No. 718 specifies, that the existence of distinct groups on opposite sides of the alleged undue discrimination is the first of three prerequisites for a sec. 403(c) claim. Scale differences are one factor – though not the only one – in establishing that households and businesses are such distinct groups.¹

By arguing that this same fact shows that businesses and households are not similarly situated – the second prerequisite for a discrimination claim – NPPC employs a statutory logic which would essentially nullify sec. 403(c). If the facts establishing that such groups are distinct are then taken, as NPPC takes them here, to show that the

¹ GCA Complaint, pp. 10-11 and 13 et seq.

groups are not similarly situated, then a viable claim of discrimination is impossible. Under NPPC's reasoning, either there are not two distinct customer groups facing different prices (the first prerequisite listed in Order 718) or, if there are, then they are not similarly situated (the second prerequisite). The argument, in other words, effectively makes sec. 403(c) a nullity, and the Commission's sec. 3662 authority to enforce it unusable.

To reinforce its argument, NPPC postulates that a household with sufficient originating volume could obtain a meter and thereby enjoy the lower Metered Letter rate. NPPC does not respond to our demonstration, based on household-origin volumes recorded in Postal Service *Household Diary Study* reports, that households with such volumes do not exist. At p. 15 of the complaint, we show that the household with the largest mailing budget we found in our investigation would incur a capacity cost (i.e., meter rental for the most basic machine) of \$2.44 per letter – as against a saving of \$0.41 per month for the whole group of originating letters. If one looks at actually existing households, rather than imagining one with an extraordinary level of demand for letter mail, it is clear that they are distinct from businesses.

A difference in volume does not make these two groups dissimilarly situated, any more than the difference in originating volume between GameFly and Netflix, raised by the Postal Service as forestalling a discrimination complaint and examined in Order 718, ¶¶ 4115-4120, precluded the Commission's finding that, contrary to the Postal Service's argument, they were similarly situated.

How GCA demonstrated similarity of situation. In any event, GCA did show similarity of situation. GCA's complaint shows that the two groups are similarly situated by virtue of using – and having no choice but to use – the same Postal Service product. Both groups of customers are required to use First-Class Single-Piece Letters for bills and statements of account, messages containing personal information², or anything

² The *DMM* makes it clear that "personal information" means anything specific to a particular person. Thus a birthday card sent to a cousin would constitute personal information, simply by virtue of being

handwritten or typewritten. *Domestic Mail Manual* 133, 3.2 to 3.4. We showed that, except for the mode of postage evidencing, the product is identical for both groups.³

Order No. 718 in Docket C2009-1 requires that inquiry into similarity of situation focus on relevant factors confirming or disconfirming similarity. It is important that Order 718 dealt with a situation in which the complainant was *not* using the same product used by the alleged beneficiaries of the discrimination.⁴ Despite this fact, the Commission found the complainant and the alleged beneficiaries similarly situated.⁵ Here the two groups do use the same product – because they must – and are thus similarly situated. The issue the Commission faced in Order 718 involved the complainant’s “choice” of a *different* product than the one used by the alleged beneficiaries. In our situation there is no choice. To use a practical illustration: how is a householder mailing a \$100 telephone bill payment⁶ using an adhesive stamp differently situated from small businessperson mailing a \$100 telephone bill payment using a meter strip?

II. THE QUESTION OF RATIONAL BASIS

NPPC says, and we agree, that the third necessary element for a successful claim of undue discrimination is that the discrimination lack a rational basis. Here, our disagreement is over whether we have made that showing. Again, there is a material issue for Commission decision. We believe that the complaint shows an absence of rational basis for maintaining the present differential.

“specific” to her. *DMM* 133 3.3. And because the mailer had signed it, it would also contain handwritten material. *Id.*, 3.4.

³ Complaint, *pp.* 11-13.

⁴ GameFly, Inc., was mailing its DVDs as flats while Netflix and Blockbuster used letter service and received hand processing to avoid the breakage which concerned both them and GameFly.

⁵ See particularly Order 718, ¶ 4087.

⁶ We showed (Complaint, p. 12, fn. 20) that bill payments are the largest component of household-origin mail (3.10 billion of 5.35 billion pieces in FY 2018).

Here, it is significant that NPPC has stated in very general terms the Postal Service policy decisions which led it to establish the Metered Letter rate in Docket R2013-10 and possibly also to maintain it since then. GCA submits that this is not enough to forestall a claim of discrimination. It is important to examine the situation as it exists today.

How long does a “rational basis” remain effective? A basic question for the Commission is how far the existence of a basis for a pricing decision arguably rational *at the time it was made* may continue to protect that decision against a claim that its subsequent history demonstrates that that basis (if it was rational to begin with) has disappeared. A pricing decision, for the Postal Service or any other business, is not immutable – or at least should not be. If background conditions change, it may be necessary to change the pricing decision too. The same is true if expectations of benefit from the pricing decision, even if reasonable *ex ante*, are disappointed in practice. And still another possibility – especially important here – is that the original pricing decision may be expanded to the point where benefits, perhaps reasonably anticipated at the outset, are swamped by the unfavorable revenue effect of the expansion. And when that situation amounts to an undue or unreasonable discrimination, the regulator must intervene.

A real-world example may make this clearer. In Docket R2006-1, the Postal Service proposed to eliminate the carrier route discount from First-Class Automation Letters. It stated that not only had carrier route volume fallen, but the sortation had “little or no value” to the Postal Service because of the advent of delivery point sequencing. The Commission agreed.⁷ This is an example of a pricing decision, rational when made – i.e., when carrier route sortation materially benefited the Postal Service – that had ceased to be useful when background conditions changed, and so was duly reversed.

⁷ PRC Op. R2006-1, ¶¶ 5176-5179.

NPPC cites several Commission decisions as showing that the necessary rational basis does, or did, exist. The most recent of these, for reasons just explained, is the most relevant. This is Order No. 5285 (Docket R2019-1). Order 5285 repeatedly states that the Metered Letter differential is justified because Metered Letters are less costly to process. That their processing cost is smaller is true, as GCA's complaint recognizes. What was not before the Commission in that proceeding was a quantified comparison of the cost saving with the size of the differential. In Docket R2019-1 the differential, originally \$0.01, was increased from \$0.03 (approximating the saving in volume variable⁸ processing cost) to \$0.05 (more than one-and-one-half times the volume variable processing saving).

The major change in the relationship between the differential (\$0.01 when introduced in Docket R2013-10) and the difference in cost between Stamped and Metered Letters is a good example of the kind of change over time which may make a past pricing decision inappropriate and, in circumstances like those here present, unduly and unreasonably discriminatory. GCA is asking the Commission to consider the *present* conditions produced by the differential in its present form.

Rational basis. The "rational basis" cited in Order 5285 included findings that the differential promoted more efficient mail (not requiring all the same processing operations) which avoided costs associated with stamp production and distribution, and that it would deter migration of eligible mail to e-media. These are no doubt relevant considerations, but were discussed in a generalized manner and evidently not geared to present conditions. The pricing decision considered generally may be thought rational, even when in present-day actuality it is producing undesirable results. NPPC's argument is at the same generalized level. GCA asks the Commission to inquire whether that reasonable basis exists *now*. We believe it does not.

⁸ This is only one element of the total cost difference between Stamped and Metered Letters; we cite it here merely because it is the only one directly reported by the Postal Service. Section II.E. of the complaint, starting on p. 17, presents the detailed analysis of the cost difference using that and various other cost elements as comparators.

III. THE DIFFERENTIAL IN RELATION TO COST DIFFERENCE

GCA demonstrated⁹ that the Metered Letter differential exceeds the cost difference between stamped and metered letters by at least 58 percent and possibly as much as 480 percent. NPPC argues that sec. 403(c) is not a “cost-difference based test, unlike the Section 3622(e) workshare discount provision.”¹⁰

This argument seems to reduce to two propositions: (i) the Metered Letter rate is not a workshare discount subject to sec. 3622(e); and (ii) there is no other statutory or regulatory provision forbidding it to exceed the cost difference.

We agree with proposition (i), but not with proposition (ii). Section II.E. of the complaint contains our demonstration, and at p. 21 we tie that demonstration to sec. 403(c), which is just as binding on the Postal Service as the workshare provisions. Sec. 403(c) forbids undue and unreasonable discrimination. We explained that its being substantially greater than the cost saving is one reason why the Metered Letter differential is unreasonable: it forces non-eligible customers to bear a greater and undue portion of operating costs. We go on to explain that an unfavorable relation to cost difference plays a different role in a sec. 403(c) inquiry than it would under sec. 3622(e). If, as seems to be the case, NPPC is tacitly assuming that to be legally objectionable such a relationship must be specifically named in a statutory or regulatory provision, the Commission should reject that view.

IV. REVENUE

NPPC argues that since the Postal Service characteristically raises prices as nearly as possible up to the cap, we are mistaken in raising the issue of revenue adequacy. To be clear, GCA is not arguing that the differential causes the Postal Service to

⁹ Complaint, section II.E, starting on p. 17.

¹⁰ NPPC Motion, p. 5.

refrain from using the cap space available. We recognize that it does; see the complaint at p. 32 and fn.50. Revenue adequacy can also be viewed from a product perspective, and the necessary reallocations of a (perhaps invariant) total revenue considered. That is what our discussion of objective (b)(5) sets out to do.

V. CONCLUSION

We have shown in the body of this Answer that GCA's complaint raises material issues of law and fact. For the reasons set forth in this Answer, GCA respectfully requests the Commission to deny NPPC's motion to dismiss.

February 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have today served the foregoing pleading in a true and correct copy, via the Commission's Filing On Line system and by individually addressed electronic mail, upon

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